

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-O-13068-RAP
)	(08-O-13092; 08-O-13619
FRED RUCKER)	08-O-14228; 09-O-14621
)	09-O-16043; 09-O-18931)
Member No. 82754)	DECISION
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this disciplinary matter, Agustin Hernandez appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Fred Rucker did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be actually suspended for two years and until he makes specified restitution and complies with former rule 205, Rules Proc. of State Bar,¹ and standard 1.4(c)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct.²

¹ Further references to the Rules of Procedure are to the Rules of Procedure in effect until December 31, 2010, unless otherwise specified.

² Further references to standard or std. are to Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct.

II. Significant Procedural History

Respondent was admitted to the practice of law in California on November 29, 1978, and has been a member of the State Bar at all times since.

The Notice of Disciplinary Charges (NDC) was filed on October 19, 2010, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section³ 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On October 22, 2010, respondent was properly served at his official address with a notice advising him, among other things, that a status conference would be held on November 30, 2011.

Respondent did not appear at the November 30, 2010, status conference. On that same date, he was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the NDC. On January 4, 2011, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested, and by regular mail. Respondent did not respond to the motion.

By order filed on January 25, 2011, the court denied the motion for entry of default as this matter would be more properly adjudicated pursuant to the former Rules of Procedure.

On February 3, 2011, a motion for entry of default pursuant to the former Rules of Procedure was filed and properly served on respondent at his official address by certified mail, return receipt requested, and by regular mail. The motion advised him that minimum discipline

³Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

of actual suspension for two years and until he complied with former rule 205 and standard 1.4(c)(ii) would be sought if he was found culpable.

On February 23, 2011, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested.

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing on March 16, 2011, after the State Bar filed and properly served its closing brief on respondent on March 14, 2011.

III. Findings of Fact and Conclusions of Law

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (§6088; Rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Case No. 08-O-13068 - The Hakakha Matter

Facts

In June 2007, respondent was substituted in as counsel for Faramarz B. Hakakha, the defendant in litigation and represented him until May 2008. (*Lipow v. Hakakha*, Los Angeles County Superior Court case no. SC090781.)

Trial was scheduled for on May 27, 2008. After discussion, respondent understood that his client wanted to proceed without respondent's representation and to handle the matter himself. Respondent did not file a signed substitution of attorney or a motion to withdraw in Hakakha's case.

At a final status conference held on May 21, 2008, Hakakha requested a continuance of the trial date because he had been abandoned by respondent. The court continued the trial and ordered respondent to appear personally on June 11, 2008, and show cause why he should not be sanctioned (sanctions OSC). Plaintiff's counsel served and respondent received notice of the OSC.

Respondent did not appear at the sanctions OSC hearing on June 11, 2008 or file any written response. The court ordered him to pay \$1,500 in sanctions.

On July 17, 2008, the court issued and the sheriff served an order to show cause why respondent should not be held in contempt (contempt OSC).

On November 24, 2008, respondent appeared in court to respond to the contempt OSC, which was continued to December 11, 2008. He also paid the previously-ordered \$1,500 in sanctions to the court.

Respondent appeared at the December 11 hearing. The court ordered that Hakakha retrieve his documents from respondent and continued the hearing to January 16, 2009.

On January 16, 2009, respondent informed the court that he had made four written requests to Hakakha to pick up his file. He stipulated that he would pay a fine of \$750 to the court no later than March 17, 2009.

Respondent did not report to the State Bar within 30 days or thereafter of learning of either the \$1,500 or \$750 court-ordered sanctions imposed on him in the Hakakha case.

On February 2, 2009, respondent represented Hakakha in a half-day trial.

Conclusions of Law

1. Count One – (Rules Prof. Conduct, rule 3-700(A)(1))⁴ [Improper Withdrawal]

Rule 3-700(A)(1) provides that, if permission for termination of employment is required by the rules of a tribunal, an attorney shall not withdraw from employment in a proceeding before that tribunal without obtaining its permission.

By withdrawing from representation of Hakakha without either filing a substitution of attorney or making a motion to the court to withdraw, respondent withdrew from employment in a proceeding before a tribunal without its permission in willful violation of rule 3-700(A)(1).

2. Count Two – (Bus. & Prof. Code, § 6068, subd. (o)(3) [Not Reporting Sanctions]

Section 6068, subdivision (o)(3) requires an attorney to report in writing to the State Bar the imposition of any judicial sanctions against him or her except for sanctions for failure to make discovery or monetary sanctions of less than \$1,000. The report must be made within 30 days of the time the attorney has knowledge of the sanctions.

By not ever informing the State Bar of the court-ordered sanctions in Hakakha's case, respondent did not report to the State Bar, in writing, within 30 days of the time respondent had knowledge of the imposition of any judicial sanctions against respondent in willful violation of section 6068, subdivision (o)(3).

B. Case No. 08-O-13092- The Dahdul Matter

Facts

In February 2008, respondent was substituted in as counsel for plaintiff Ghassan Dahdul in litigation and represented him until May 2008. (*Dahdul v. Eneinstein*, Los Angeles County Superior Court case no. VC048331.) He never filed a substitution of attorney or a motion to withdraw as plaintiff's counsel.

⁴ Unless otherwise indicated, all further references to rules refer to the State Bar Rules of Professional Conduct.

Respondent did not appear for a May 5, 2008 hearing on defendants' motion for summary adjudication. The motion was granted. Defendants' cross-complaint against Dahdul still had to be resolved.

Respondent did not appear for a May 7, 2008 mandatory settlement conference in the Dahdul case. The court set an OSC hearing for June 4, 2008, the time previously set for trial on the cross-complaint, regarding striking Dahdul's answer to the cross-complaint.

Respondent did not appear at the OSC hearing and trial. Dahdul appeared and informed the court that he was in the process of employing new counsel. The court continued the trial to July 29, 2008, and set an OSC regarding sanctions against respondent to be heard that same date.

Respondent did not appear for the July 20 OSC hearing. The court found that respondent had abandoned his client and not complied with its orders. He was sanctioned to pay \$1,000 to the court forthwith. The court served a copy of the order on respondent by mail to his address of record. Respondent received the order but did not pay the sanctions or report them to the State Bar.

Conclusions of Law

1. Count Three - (Rule 3-700(A)(1) [Improper Withdrawal])

By not filing a substitution of attorney or a motion to withdraw as Dahdul's counsel, respondent withdrew from employment in a proceeding before a tribunal without its permission in willful violation of rule 3-700(A)(1).

2. Count Four – (§ 6103) [Violation of Court Order]

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to willfully disobey or violate a court order requiring him or her to do or to forbear an

act connected with or in the course of his or her profession, which he or she ought in good faith to do or forbear.

By not paying the court-ordered \$1,000 sanctions in the Dahdul case, respondent willfully disobeyed or violated an order of the court requiring him to do or forbear an act connected with or in the course of respondent's profession which he ought in good faith to do or forbear in willful violation of section 6103.

3. *Count Five – § 6068, subd. (o)(3) [Not Reporting Sanctions]*

Respondent did not report to the State Bar, in writing, within 30 days of the time he had knowledge of the imposition of sanctions against him in the Dahdul case in willful violation of section 6068, subdivision (o)(3).

C. Case No. 08-O-13619 - The Silva Matter

Facts

On August 14, 2006, Gary Silva employed respondent to represent him in a civil matter for an hourly fee. On September 26, 2006, respondent filed a civil action on his behalf. (*Silva v. Woodsland Properties, et al.*, Los Angeles County Superior Court case no. BC359172.)

On October 10, 2007, the court entered a default judgment in Silva's favor that respondent prepared. It listed Woodsland Properties, L.L.C., and Aaron L. Woods, Jr., as the only defendants against whom the judgment was to be entered. The court struck the requested prejudgment interest from the judgment.

In November 2007, respondent informed Silva that the court had granted a judgment but denied the requested prejudgment interest on the grounds that the rate was usurious. He told Silva that he would ask the court to award interest at a lesser rate. Respondent later determined that he could not seek a different interest rate but did not inform Silva.

Although respondent received telephone messages from Silva between December 2007 and February 2008, he did not respond to Silva's status inquiries.

On February 22, 2008, Silva sent respondent a letter asking him to communicate with him. Respondent received the letter but did not respond to it.

In April 2008, Silva telephoned respondent and was able to speak with him. Respondent apologized for not responding to Silva's calls and informed him that respondent had moved his office.

In June 2008, Silva left a message for respondent to return his call. Respondent received the message but did not contact Silva or otherwise respond to his call.

On July 23, 2008, respondent filed a notice of entry of judgment with the court in Silva's case and served all the defendants. Respondent did not take any action to correct the judgment to list all defendants. He also took no further action on Silva's behalf to enforce the judgment.

Conclusions of Law

1. Count Six – (§6068, subd. (m) [Failure to Communicate]

Section 6068, subdivision (m) requires an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By not responding to Silva's requests for information on his case, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

2. Count Seven – (Rule 3-110(A) [Failure to Perform Competently])

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not taking action to correct the judgment to name all defendants, not advising

Silva regarding whether he could seek an award of prejudgment interest and not acting to enforce the judgment in the Silva case, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

D. Case No. 08-O-14228 - The Penoyer Matter

Facts

On August 31, 2006, Shawn Penoyer employed respondent to defend him in civil litigation. (*Easton v. Penoyer*, Los Angeles Superior Court case no. BC35661.)

On May 7, 2007, the court ordered respondent and Penoyer to pay \$1,540 in discovery sanctions. On May 11, 2007, plaintiff's counsel mailed a notice of ruling to respondent informing him of the court's order. He received it.

On May 23, 2007, the court ordered respondent and Penoyer to pay an additional \$1,540 in discovery sanctions. Respondent was present at the hearing and had personal knowledge of the sanctions order.

Respondent did not promptly inform Penoyer of the discovery sanctions. In May 2008, he gave Penoyer a copy of the plaintiff's proposed judgment which included the sanctions. This was the first time that Penoyer learned about the sanctions.

On June 13, 2008, the court filed a judgment for \$19,806 in the Easton case, including damages, prejudgment interest, costs and sanctions with interest to date.

Respondent has not paid the sanctions.

Conclusions of Law

1. Count Eight - (§ 6068, subd. (m) [Failure to Communicate])

By not informing Penoyer until May 2008 of the sanctions ordered in May 2007, respondent did not keep a client reasonably informed of significant developments in a matter in

which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

2. Count Nine – (§ 6103 [Violation of Court Order])

By not paying the sanctions ordered against him and Penoyer, respondent willfully disobeyed or violated an order of the court requiring him to do or forbear an act connected with or in the course of respondent's profession which he ought in good faith to do or forbear in willful violation of section 6103.

E. Case No. 09-O-14621 - The Bronsdon Matter

Facts

In May 2007, Phillip E. Bronsdon employed respondent to represent him in a civil matter. On July 13, 2007, respondent filed the civil action. (*Bronsdon v. Single Source Technology, Inc., et al.*, Los Angeles Superior Court case no. BC374286.)

On December 8, 2008, the court entered judgment in Bronsdon's favor against two of the defendants.

In 2009,⁵ Bronsdon's judgment against one of the defendants, Robert Landeros, was discharged in bankruptcy.

On March 13, 2009, the other defendant, Gilbert Rousseau, filed for bankruptcy. Respondent and Bronsdon learned of this bankruptcy filing at a debtor's examination on March 16, 2009.

On April 5, 2009, respondent informed Bronsdon by email that respondent would prepare a petition to contest the discharge of Bronsdon's judgment by Rousseau in the bankruptcy court and would send Bronsdon a fee agreement for the additional representation. Bronsdon

⁵ The specific date is not ascertainable as the NDC alleges the discharge in bankruptcy occurred on "6, 2009." (NDC 10:2.)

authorized by email that respondent continue as his counsel. Respondent did not prepare or file any papers in Rousseau's bankruptcy proceedings or send Bronsdon a fee agreement.

On May 4 and 18, 2009, Bronsdon asked respondent by email whether he had filed papers and whether the bankruptcy case was still active. Respondent received the email but did not answer it or otherwise communicate with Bronsdon.

On June 11, 2009, Bronsdon complained by email to respondent that he had not responded to his email and terminating respondent.

On September 2, 2009, Bronsdon sent respondent an email asking him to return his client file. In a September 17, 2009 response, respondent stated that he would send Bronsdon's file that night. He never did so or otherwise inform Bronsdon how he could obtain the file.

On September 27 and October 8, 2009, Bronsdon sent respondent emails informing him that he had not received the file and inquiring if it had been mailed. Respondent received the emails but did not respond.

Conclusions of Law

1. Count 10 - (§ 6068, subd. (m) [Failure to Communicate])

By not responding to the May 4 and 18, 2009 emails from Bronsdon about the status of his case, respondent did not respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

2. Count 11 – (3-700(D)(1) [Not Returning Client Files])

By not releasing Bronsdon's client file upon request after agreeing to do so, respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property in willful violation of rule 3-700(D)(1).

F. Case No. 09-O-16043 - The Carson Matter

Facts

On March 12, 2009, James Carson employed respondent to represent him in a civil dispute and paid him \$500 in advanced fees. Respondent agreed to write a demand letter for Carson to resolve the dispute.

From April to July 2009, Carson sent and respondent received various emails and telephone messages inquiring into the status of his case. Respondent did not answer the emails or calls or otherwise inform Carson of the status of his case. Carson was able to speak to respondent by phone once. Respondent told him that he would call him back but did not tell him the status of his case. Respondent did not call Carson back.

Respondent did not send the demand letter on Carson's behalf or advise him as to any other course of action in his case.

On August 14, 2009, Carson mailed and respondent received a letter effectively terminating his representation and requesting a refund of the \$500 advanced fees. Respondent has not provided Carson with an accounting for the \$500 paid to him as advanced fees.

Respondent did not perform any services of value to Carson and did not earn any of the \$500 he was paid as advanced fees. He has not refunded any of the \$500 advanced fees he received from Carson.

Conclusions of Law

1. Count 12 - (6068, subd. (m) [Failure to Communicate])

By not responding to Carson's emails and telephone calls, respondent did not respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

2. Count 13 – (Rule 3-110(A)) [Failure to Perform Competently]

By not sending the demand letter for Carson or otherwise advising him as to any other course of action in his case despite repeated inquiries from Carson, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

3. Count 14 – (Rule 4-100(B)(3)) [Not Accounting for Client Funds]

By not providing Carson with an accounting for the \$500 paid to him as advanced fees, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession in willful violation of rule 4-100(B)(3).

4. Count 15 – (Rule 3-700(D)(2)) [Not Returning Unearned Fees]

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

By not refunding any of Carson's \$500 after his services were terminated, respondent did not refund promptly any part of a fee paid in advance that has not been earned in willful violation of rule 3-700(D)(2).

G. Case No. 09-O-18931- The Reiter Matter

Facts

On April 3, 2009, David I. Reiter employed respondent to represent him on a contingency-fee basis in a civil claim against his prior legal counsel. On May 29, 2009, respondent filed a civil action on Reiter's behalf. (*Reiter v. Vaccaro*, Los Angeles Superior Court case no. BC414778.)

In June 2009, the defendant in Reiter's case served discovery requests on respondent. On July 1, 2009, respondent sent the discovery requests to Reiter asking him to draft responses. On July 23, 2009, Reiter emailed draft discovery responses to respondent. Respondent did not provide responses to the discovery to the defense counsel.

On July 8, 2009, the defendant filed a motion to strike the first cause of action. Respondent received a copy of the motion.

On August 11, 2009, respondent and defense counsel stipulated to continue the August 24, 2009 motion hearing to September 30, 2009, the same date as a case management conference.

On August 31, 2009, respondent informed Reiter by email of the new motion hearing date; that he had put off filing opposition due to the continuance; and that he would have a draft opposition for Reiter's review by Friday of that week. Respondent did not provide Reiter with a draft of the opposition.

On September 17, 2009, respondent again told Reiter that he would send him a draft response to the motion, but did not do so.

On September 22 and 29, 2009, Reiter sent and respondent received email requesting a draft response and inquiring if he should appear for the hearing. Respondent did not answer before the hearing.

Respondent did not serve or file opposition to the motion to strike or a case management statement.

At the September 30, 2009, hearing, respondent obtained a continuance to November 4, 2009, explaining that he had not filed an opposition or a case management statement due to a calendaring error. The court granted the continuance on condition that Reiter and respondent pay for defense counsel's appearance time and warned respondent that there would be further sanctions if the court found that the opposition was not arguably cogent. Respondent and defense counsel agreed that the cost of his appearance time was \$375 and respondent paid it.

After the hearing, respondent informed Reiter by email that the hearing had been continued and that he would be completing his research for the opposition by the weekend. He did not tell Reiter the reason for the continuance or about the sanctions ordered paid to opposing counsel.

On October 6, 8 and 19 and November 2, 2009, Reiter sent and respondent received email requesting a copy of any response to the motion. Respondent did not answer. He never provided Reiter with a draft response to the motion.

Respondent did not file opposition to the motion to strike or a case management statement.

Respondent did not appear at the November 4, 2009, motion hearing and case management conference, but sent an attorney to appear on his behalf. Counsel stipulated to the court's tentative ruling to grant the motion. The court also continued the case management conference to December 9, 2009, and set a hearing on an OSC regarding sanctions against plaintiff for not filing and serving the case management statement. Respondent was served with and received notice of the court's ruling.

On November 16, 2009, Reiter made a complaint to the State Bar about respondent's conduct in the Reiter case.

On November 23, 2009, Reiter sent and respondent received email contesting respondent's accounting for advanced costs.

On December 9, 2009, respondent appeared for the case management conference but he had not filed a case management statement. The court ordered him and Reiter to pay \$500 to defense counsel by January 7, 2010. Reiter also appeared and consented to respondent's termination as his attorney.

On December 10, 2009, respondent sent Reiter an email offering to refund advanced costs which had been properly applied to costs if Reiter agreed to withdraw his State Bar complaint.

Conclusions of Law

1. Count 16 - (Rule 3-110(A)) [Failure to Perform Competently]

By not providing responses to discovery; not filing a case management statement or a response to the motion to strike; or advising his client regarding what response could be made, respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

2. Count 17 – (§ 6068, subd. (m)) [Failure to Communicate]

By not informing Reiter of the reasons for the continuance of the motion hearing and the imposition of sanctions against him and respondent; and by not responding to Reiter's e-mail prior to the hearing on November 4, 2009, respondent did not respond promptly to his client's reasonable status inquiries and did not keep his client reasonably informed of significant developments in a matter in which he had agreed to provide legal services in willful violation of section 6068, subdivision (m).

3. Count 18 – (§ 6090.5, subd. (a)(2) [*Agreement to Withdraw State Bar Complaint*]

Section 6090.5, subdivision (a)(2) makes it a cause for suspension or disbarment or other discipline for an attorney, whether as a party or as an attorney for a party, to agree or seek agreement that the plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.

By offering to refund disputed costs to Reiter if he agreed to withdraw his State Bar complaint, respondent acted as a party or as an attorney for a party and agreed or sought agreement that a plaintiff would withdraw a disciplinary complaint or would not cooperate with the investigation or prosecution conducted by the disciplinary agency in willful violation of section 6090.5, subdivision (a)(2).

IV. Aggravation and Mitigation

A. Aggravation

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

1. Multiple Act of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

2. Harm to Client/Public/Administration of Justice

Respondent's misconduct significantly harmed clients, the public or the administration of justice. (Std. 1.2(b)(iv).) Respondent exposed Penoyer to financial liability by not paying sanctions ordered against them that Penoyer did not know about. He also exposed Reiter to financial liability for sanctions. Additional court proceedings were required in the Hakakha and Dahdul matters due to respondent's misconduct.

3. Lack of Candor/Cooperation to Victims/State Bar

Respondent's failure to participate in these proceedings prior to the entry of default is also

an aggravating factor. (Std. 1.2(b)(vi).) He has demonstrated his contemptuous attitude toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the court to participate therein, a serious aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

B. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).)

1. No Prior Record

The absence of a prior record of discipline over many years of practice prior to the commencement of the misconduct (over 28 years) is a significant mitigating factor. (Standard 1.2(e)(i).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(b), 2.4(b), 2.6(a) and (b) and 2.10 apply in this matter. The most severe sanction is suggested by standard 2.2(b): at least three months' actual suspension regardless of mitigating circumstances for commingling entrusted funds or property with personal property or

committing another violation of rule 4-100, none of which result in the willful misappropriation of entrusted funds or property.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable, in seven client matters, of violating the following ethics standards: Rules 3-110(A) (three counts); 3-700(A)(1) (two counts); 3-700(D)(1) and (2) (one count each); and 4-100(B)(3) (one count); as well as sections 6068, subdivisions (m) (five counts) and (o)(3) (two counts); 6103 (two counts); and 6090.5(a)(2) (one count). Aggravating factors include multiple acts of misconduct, harm and lack of cooperation. There was a significant mitigating factor in 28 years of blemish-free practice. There were no other mitigating circumstances in this default matter.

The State Bar recommends actual suspension for two years and until respondent complies with former rule 205 and with standard 1.4(c)(ii) and until he makes restitution to James Carson as set forth below. The court agrees.

In *Pineda v. State Bar* (1989) 49 Cal.3d 753, the Supreme Court actually suspended the attorney for two years and placed him on probation for five years with a five-year stayed suspension because he had accepted fees from clients, failed to perform the services for which he was retained, refused to communicate with his clients, then abandoned them and kept the fees in seven client matters over a period of about eight years. His misconduct began four years after he was admitted to the practice of law. Misappropriation of client funds by itself is a gross violation

of an attorney's professional oath and generally merits an actual suspension of at least one year. (*Id.* at p. 759.) He was not disbarred in view of the mitigating factors, including his cooperation with the State Bar, his demonstrated remorse and his concurrent family problems. Respondent Pineda participated in the proceedings and presented mitigating evidence, unlike in the instant case. He was found culpable of greater misconduct and less aggravation than presented here.

Respondent's misconduct and lack of participation in this matter raises concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. No explanation has been offered that might persuade the court otherwise and the court can glean none. Having considered the evidence and the law, the court believes that actual suspension for two years to remain in effect until he makes restitution to James Carson and complies with former rule 205 and with standard 1.4(c)(ii), among other things, is adequate to protect the public and proportionate to the misconduct found and the court so recommends.

VI. Recommendations

Accordingly, it is hereby recommended that respondent be suspended from the practice of law for three years; that said suspension be stayed; and that he be actually suspended from the practice of law for two years and until:

(1) He makes restitution to James Carson in the amount of \$500.00 plus 10% interest per annum from March 12, 2009 (or to the Client Security Fund to the extent of any payment from the fund to James Carson, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d);

(2) The State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Former rule 205(a), (c), Rules Proc. of

State Bar); and

(3) He has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, former rule 205(b), Rules Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

A. Multistate Professional Responsibility Examination

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation during the period of actual suspension. **Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) and (E), Rules of Procedure of the State Bar.**

B. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in

paragraph (c) within 40 days of the effective date of the order showing compliance with said order.⁶

C. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: June 7, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court

⁶ Noncompliance with rule 9.20 (former rule 955, Cal. Rules of Court) could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)